November 2, 2016

Bernard M. Plum
Member of the Firm
d 212.969.3070
f 212.969.2900
bplum@proskauer com
www.proskauer.com

By eFile

Hon. Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: *NBCUniversal Media, LLC, v. NLRB*, Nos. 14-1055 & 14-1080, 815 F.3d 821 (D.C. Cir. Feb. 23, 2016), remanding in full 360 NLRB No. 69 (Apr. 7, 2014)
Board Case No. Case 02– CA–115732

Dear Mr. Shinners:

We represent NBCUniversal Media, LLC ("NBC") in the above referenced matter. Pursuant to the October 4, 2016 letter from the Office of the General Counsel ("General Counsel"), we submit this supplemental statement to address an issue raised for the first time in the General Counsel's September 2, 2016 position statement on remand. The General Counsel contended, as an alternative, that the Board should accrete Content Producers to the "A" Unit of the NBC-National Association of Broadcast Employees and Technicians ("NABET") Master Agreement, rather than to the heretofore nonexistent nationwide unit purportedly created by the Acting Regional Director ("ARD"). This novel but baseless argument must be rejected because: (i) Board rules and cases prohibit the General Counsel from asking the Board to modify a bargaining unit during an unfair labor practice ("ULP") proceeding when the issue was never raised in the underlying unit clarification proceeding; (ii) NBC will be severely prejudiced if the Board allows the General Counsel to make such an argument for the first time on remand; and (iii) based on the record to date, the "A" unit, which is a unit of engineers, is not an appropriate unit for Content Producers.

I. It Is Not Appropriate To Seek To Include Content Producers in the "A" Unit Because That Issue Was Never Litigated in the Unit Clarification Proceeding

The only issue in this ULP proceeding is whether NBC violated a duty to bargain with NABET by refusing to place Content Producers into what the ARD held was a single, nationwide unit covering all NABET-represented NBC employees. NABET never sought to include Content Producers in the "A" Unit, which is made up entirely of technical engineering employees, and NBC has never been ordered to negotiate with NABET regarding the Content Producers as part of that "A" Unit.

On March 15, 2011, the first hearing day of the unit clarification proceeding, counsel for NBC sought clarity on this exact issue. Mr. Curley said:

> I'm just asking for NABET-CWA to tell us which unit they believe the content producer should be accreted into. We have different units under the agreement. And we believe that we have a right to know and not guess whether they are looking to accrete these employees into the national engineering A unit under the contract. It's one unit. It is very large. And it is national in scope. Or whether they are taking the position that these content producers in the various cities should be accreted into the geographic specific writers' unions in those citing under the M, N, and H agreement.... And we shouldn't be forced to guess where they say they should fit as a matter of fundamental fairness and as a matter of law.

(New York Tr. 27.)

In response, NABET's counsel said, "[The NABET-represented employees covered by the Master Agreement] are all in one bargaining unit. And that is the sector's position on this issue." (New York Tr. 55.) Local 11's counsel also took the position that the Master Agreement

covered only a single bargaining unit. (New York Tr. 79.) There was no further discussion of whether Content Producers should be accreted to the "A" Unit.

Section 102.67(f)[1] of the Board's Rules and Regulations "precludes re-litigation in any related subsequent ULP proceeding of any issue which was, or could have been raised in the representation proceeding where the party seeking to raise the same has failed to request review."[2] *Cedar Grove Manor Convalescent Ctr.*, 314 NLRB 642, 653 (1994). Similarly, in *Pace Univ. v. N.L.R.B.*, 514 F.3d 19 (D.C. Cir. 2008), the D.C. Circuit upheld a Board decision which refused to hear an employer's challenge to the scope of a bargaining unit raised for the first time in an unfair labor practice proceeding, because the issue could have been litigated in the preceding unit clarification proceeding. The D.C. Circuit held in relevant part:

> The Board has drawn a "well established" line between representation and unfair labor practice proceedings, requiring that any issues that may be presented during the representation proceeding must be offered there. As a refusal-to-bargain unfair labor practice proceeding addresses a charge "based on the record made at the earlier representation proceeding," "a party must raise all of his available arguments in the representation proceeding rather than reserve them for an enforcement proceeding."

Id. at 23–24 (internal citations omitted).

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1 Although this subsection became 102.67(g) when the Board updated its Rules and Regulations in 2014, the revised rules only apply to petitions filed after April 14, 2015. *Vhs of Michigan, Inc. d/b/a Detroit Med. Ctr.*, 363 NLRB No. 155 (Mar. 29, 2016). Because NABET filed its petitions in this matter in 2011, the Board's prior rules, and thus subsection (f), apply to this case.

2 NBC filed a Request for Review of the ARD's October 26, 2011 unit clarification decision ("UC Decision"), which the Board denied on September 25, 2013. (*See* NBC's final brief to the Court in *NBCUniversal Media, LLC v. NLRB*, No. 14-1055 (D.C. Cir. Feb. 23, 2016), submitted May 14, 2015.) Because NABET did not file and was not granted a request for review, it is precluded from arguing that Content Producers should be accreted into the "A" unit.

These authorities demonstrate that the current ULP hearing cannot be used to clarify the bargaining unit in a manner never contemplated, let alone litigated, in the underlying unit clarification proceeding. The General Counsel, thus, may not in this proceeding change the Board's position as to which bargaining unit(s) Content Producers must be accreted.

II. NBC Will Be Severely Prejudiced If the New Argument Concerning Accretion to the "A" Unit Is Allowed at This Stage

In addition to not raising the "A" Unit argument during the UC proceeding, the General Counsel failed to raise the argument at any previous point in the ULP case. The General Counsel never raised the issue when it filed for summary judgment, when it replied to NBC's response to summary judgment,[3] or even when it was before the Court of Appeals. Raising the issue now, so late in the proceeding, is clearly prejudicial to NBC.

Perhaps because the circumstances and timing of the General Counsel's argument are so extraordinary, there is no relevant case law on this particular issue. But, in an analogous situation, it is well settled that no party is allowed to raise an issue on appeal that was not raised in the ULP proceeding. For example, in *DynCorp, Inc. v. N.L.R.B.*, 233 F. App'x 419 (6th Cir. 2007), an employer who had not raised the issue during the ULP proceeding was not allowed to argue on appeal that the Board had applied an incorrect legal standard. *Id.* at 432-33. "As we have consistently held, any argument raised for the first time on appeal is deemed waived and

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[3] The parties did not go to hearing for the ULP complaint. Instead, the General Counsel filed for summary judgment.

may not be addressed by this Court. *See, e.g., United States v. Treadway*, 328 F.3d 878, 883 (6th Cir.2003)." *Id.*

The Board itself takes the same position. *See Awg Ambassador, LLC & Steven Stroh, an Individual*, 201 L.R.R.M. (BNA) ¶ 1323 (NLRB Div. of Judges Oct. 17, 2014) (declining to entertain an argument on the enforceability of arbitration under the NLRA where it was argued for the first time on appeal).

It should go without saying that if a party is prohibited from raising an issue for the first time on appeal, the General Counsel must be prohibited from raising an argument for the first time on *remand* from an appeal.

III. Even If the New "Unit" Could Properly Be Made at This Stage, the "A" Unit Is Not an Appropriate Unit for Content Producers

If the Board ignores the obvious prejudice to NBC and its own precedent and entertains the General Counsel's argument, it must be rejected on its merits. As the ARD determined, the Content Producer position was conceived as one in which the employee might perform any or all of the functions necessary to create and produce content. Based on the record, Content Producers spend a majority of their time performing four key functions to varying degrees – producing, newswriting, editing, and shooting video.

While producing news stories is not covered by the Master Agreement, the "A" Unit covers a national unit of technical employees including editors and cameramen, but not newswriters. Instead, newswriters are covered by three separate contracts in three separate

bargaining units (H, M and N, which apply to newswriters in Chicago, Los Angeles and New York, respectively).

If the new argument is entertained by the Board, the record should be reopened so that NBC has the opportunity to submit additional evidence responsive to the General Counsel. The limited record evidence on this issue already shows the varied experiences of Content Producers, and, thus, how inappropriate accretion to the "A" Unit would be:

- One Content Producer testified about the difference between her duties and those of an editor (in the "A" Unit), explaining that she is generally "in-house…getting [] elements [other than shooting] and talking to [her] Assignment Desk." (UC Decision at 29.)

- Another Content Producer testified that she spent up to two days a week producing, and not shooting, the show *Day Brief*. She was often assigned to work in house on stories that did not require her to shoot her own material. She also "regularly" provided written content for the show *Daily Connection*. (UC Decision at 29-30.)

- A third Content Producer spent two days a week (approximately 40% of her time) writing and editing news stories, as many as 10 stories a day. (UC Decision at 38-39.)

- Yet another Content Producer spent three days a week writing and editing stories. She testified that the jobs of Photographers and Editors (covered by the "A" Unit) were "very dissimilar" to the Content Producer job. She said she spent most of her time writing. (UC Decision at 39-40.)

- A Content Producer for sports testified that he spent his time pitching story ideas, writing and editing material for the sportscast. (UC Decision at 42.)

The Content Producer position was created for the purpose of combining producing, writing, shooting, and editing functions. As a result, different Content Producers perform different functions with different areas of expertise. Notwithstanding and without prejudice to

NBC's argument that, based on the Master Agreement and the record evidence, Content Producers do not belong in any of the NABET-represented units, there is simply no question that a unit of technical engineers is far too narrow in scope to be appropriate for individuals who perform duties that in some cases are more aligned with other bargaining units, *i.e.*, newswriting units. The General Counsel failed to explain why the "A" Unit is appropriate over all other units. Instead, it simply picked a unit that is national in scope because Content Producers work nationwide, and that is surely not enough to establish a community of interest in the "A" Unit.

IV. **Conclusion**

For the reasons set forth above, the General Counsel's new argument regarding the "A" Unit must be rejected, and NBC's renews its request for dismissal of the unfair labor practice charge, or in the alternative, that the record be reopened in this matter.

Very truly yours,

Bernard M. Plum

cc: Michael J. Lebowich
Paul Salvatore

CERTIFICATE OF SERVICE

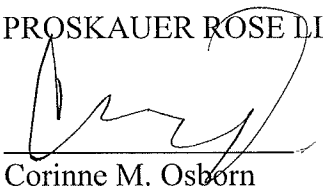
I, Corinne Osborn, an attorney, hereby certify that on November 2, 2016, I caused a true and complete copy of NBCUniversal Media, LLC's answering brief to be served via electronic filing and/or electronic mail, as indicated below, upon the following persons:

By E-File
Hon. Gary Shinners
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570

By Electronic Mail
Rachel F. Feinberg, Esq.
Counsel for the Acting General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
Rachel.Feinberg@nlrb.gov

By Electronic Mail
Judiann Cartier, Esq.
Sector Counsel
NABET, CWA
501 Third Street NW Floor 6
Washington, DC 20001-2760
jchartier@cwa-union.org

PROSKAUER ROSE LLP:



Corinne M. Osborn
Eleven Times Square
New York, NY 10036
Tel: (212) 969-3000
Fax: (212) 969-2900
Attorneys for Petitioner